Supreme Court, U.S.
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No. 98-1527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARK KNAUST, BARBARA KNAUST and HERMAN KARL KNAUST, II,

Petitioners,

v.

THE CITY OF KINGSTON, NEW YORK, THE CITY OF KINGSTON PLANNING BOARD, THE CITY OF KINGSTON LOCAL DEVELOPMENT CORPORATION and THE UNITED STATES DEPARTMENT OF COMMERCE, FOR AND THROUGH THE ECONOMIC DEVELOPMENT ADMINISTRATION, WILBUR F. HAWKINS, DEPUTY ASSISTANT SECRETARY FOR ECONOMIC DEVELOPMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR CITY OF KINGSTON RESPONDENTS

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QUESTIONS PRESENTED

1. May a Circuit Court of Appeals, in a case arising under the National Environmental Policy Act, ever find the case to be moot based on the facts and circumstances present at the time of appeal?

2. Where, upon a motion for preliminary injunction to halt the funding and construction of a business park, the factual allegations of "immediate and irreparable injury" are admittedly economic in nature and are sharply contested, may a District Court deny the motion?

Respondents also note that the Circuit Court did not address the second question proposed by petitioners.

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Respondents City of Kingston, City of Kingston Planning Board and Kingston Local Development Corporation (collectively, "the City") respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's opinion in this case.

Respondents adopt petitioners' statement of the Opinions Below, this Court's Jurisdiction and the relevant Statutory Provisions. Reference in this Brief to the Opinions Below will cite to pages as they appear in Appendices A and B to the Petition ("App. A" or "App. B").

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This action challenges the funding and construction of a Business Park in the City of Kingston, New York. As against the City, petitioners seek injunctive and monetary relief under 42 U.S.C. § 1983, contending that the Park's stormwater management system will pollute their vacant property near the Park, allegedly resulting in an unconstitutional "taking." As against the United States Department of Commerce, Economic Development Administration ("EDA"), petitioners challenge the decision to award an economic development grant to the City of $1.86 million for construction of Business Park infrastructure, as allegedly having been made in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*

In April, 1996, petitioners moved for a preliminary injunction to stop EDA and the City from further funding or development of the Business Park. Petitioners' moving papers asserted that the injunction was needed to protect their

"economic" or "business" interests. United States District Judge Scullin denied petitioners' request for a temporary restraining order, and cross-motions by petitioners and EDA for summary judgment on the NEPA claim followed.

In October, 1997, Judge Scullin denied petitioners' motion for summary judgment on the NEPA claim, granted EDA's cross motion and denied petitioners' motion for preliminary injunction. As to the latter motion, Judge Scullin found that the Knausts' allegations of "irreparable injury" from stormwater runoff were "economic" in nature and had been "directly refuted" by the City (App. B, pp. 28a-30a).

In September 1998, petitioners' appeal was dismissed as moot by the United States Court of Appeals, Second Circuit (Shadur, Senior District Judge) (App. A, pp. 1a-9a), on the ground that the Business Park had already been constructed and the EDA grant fully disbursed.

B. Facts

The City takes issue with much of petitioners' statement of the facts. Only those facts essential to the Court's consideration of the petition are set forth here. Based on these facts, the City respectfully urges that no injustice has been done which would require the exercise of this Court's jurisdiction. Petitioners retain claims for damages for the acts complained of, which are not affected by the rulings below. In addition, we assert that the facts of this case do not suggest the need for the Court to intervene to prevent harm to a statutory scheme. The petition should be denied.

1. *The Knaust Property.*

Petitioners own a three acre parcel of undeveloped property which includes a small portion of an abandoned underground mine. The major portion of the abandoned mine is under the City's Hasbrouck Park and the Business Park site and is owned by the City. Over the years, the mine has become partially flooded. A title search and survey conducted for the City reveal that petitioners have no recorded title to any portion of the flooded areas outside their portion of the mine.

Petitioners formerly ran a commercial mushroom farm on their property. They admit that this operation was abandoned over thirty (30) years ago; a fact noted by both the District Court (App. B, p. 11a) and Circuit Court (App. A, p. 2a). Petitioners' property is now in a residential zoning district, where farming is prohibited on parcels under five acres.

2. *The Kingston Business Park.*

Local and State agency approvals for the Business Park included public proceedings in compliance with the New York State Environmental Quality Review Act ("SEQRA"), N.Y. Environmental Conservation Law ("ECL"), Article 8. The SEQRA process included public review and comment upon Draft and Final Generic Environmental Impact Statements ("GEIS")[1] which discussed, among other things, the potential environmental impacts related to stormwater

1. SEQRA, the New York analog to NEPA, requires the preparation of an environmental impact statement for any publicly funded or approved project which "may" have a significant impact on the environment. ECL § 8-0109.

runoff and water quality. EDA included the Draft and Final GEIS's and the City Planning Board's final SEQRA Findings in its administrative record of the decision to award the economic development grant for the Park (App. B, p. 12a, n.2).

The City's determination to construct the Business Park arose from the need to find a new location for Huck International, Inc. ("Huck"), the City's largest manufacturing employer. Huck was not made a party to this action.

Work on the Business Park site began on May 7, 1996. By July 1996, significant portions of the Park's infrastructure and the Huck site had been completed. Beginning in August, 1996, Huck, pursuant to a long-term lease with the City, constructed a new manufacturing facility and moved its employees and operations into the Park. The Park's stormwater treatment system was completed in December 1996. All construction on Phase I of the Business Park was completed in July 1997.

The last funds under the EDA grant were disbursed to the City in September 1997. The City has no applications before EDA for additional federal funding of the Business Park, and none are planned.

Stormwater runoff from the Business Park consists of precipitation flowing from building roofs, paved areas of the parking lot and access road and landscaped and wooded areas. Stormwater passes into open grates fitted with vapor traps and deep sumps to remove contaminants and sediment; then to two 5,000 gallon "Vortechs" units for a second level of treatment to remove heavy metals, nutrients, hydrocarbons, and oil. From the "Vortechs" units, treated stormwater is

conveyed to an abandoned quarry on the Business Park property[2], and then into an existing surface drainage swale.[3]

This treatment system has been approved by federal and state regulatory agencies. In March, 1996, the New York Department of Environmental Conservation ("DEC") indicated that the system "adequately addresses this Department's concerns regarding potential groundwater contamination," and described the Park stormwater as presenting "no greater contamination threat than . . . a shopping center." The City has voluntarily elected to subject itself to the requirements of DEC's General Permit No. GP-93-06 for Storm Water Discharges.[4] The US Environmental Protection Agency ("EPA") determined in May, 1996 that this system was not subject to federal regulation as an "underground injection well."

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2. The petition implies (pp. 2-4) that this quarry is directly above the Knaust property. In fact, the record shows that the quarry is 1600' feet (more than a quarter mile) north of petitioners' property.

3. It will be virtually impossible for chemical products used at Huck to enter this stormwater treatment system. As required by EDA (App. B, p. 21a), the loading dock at the Huck facility is equipped with a closed spill-containment system and a 1,000 gallon holding tank, and there are no internal floor drains or discharge points inside the Huck facility.

4. The General Permit was issued by DEC pursuant to the authority of § 402 of the Federal Clean Water Act, as delegated to the State by the U.S. Environmental Protection Agency. Part II of the General Permit prohibits any discharges that would violate New York water quality standards, cause an "increase in turbidity," or that contain "suspended solids, residue from oil and floating substances; visible oil film; globules; or grease."

3. *The Rubin Report and the City's Response.*

Petitioners' claims are dependent upon a characterization of the regional geology by Paul Rubin which is at odds with all other evidence in the administrative record. Mr. Rubin asserts that the geology in the area of the Business Park is "karst" topography, that the Business Park site and petitioners' property are "hydraulically connected," and that treated stormwater from the Business Park may travel through unidentified subsurface channels and enter petitioners' limited area of the abandoned mine.

Mr. Rubin's report was reviewed by the City's contractors. Their response is critical of Mr. Rubin's findings and refutes his theories regarding a "hydraulic connection" between the Park site and petitioners' property. Geologic reports prepared for the City in 1973 and 1995 make no mention of "karst" topography in the region or at the Business Park site.

4. *The Jones Letter.*

Petitioners also relied on a letter from Jonathan Jones criticizing the Business Park stormwater treatment system. Mr. Jones admits that he conducted only a "conceptual-level review" of urban stormwater issues and provided "generic" lists of pollutants typically found in such stormwater. Mr. Jones did not review the design specifications of the "Vortechs" units, the City's two environmental impact statements, DEC's General Permit 93-06, or the letters from DEC and EPA concerning the treatment system. Mr. Jones was unaware of the Huck facility's spill containment system (*see* n.3, *supra*.). Nonetheless, Mr. Jones correctly perceived that the treatment system at the Park "will enhance stormwater runoff quality."

REASONS FOR DENYING THE WRIT

I.

THE ISSUES PRESENTED BY PETITIONERS HAVE NO IMPORTANCE BEYOND THE FACTS OF THIS CASE. THESE FACTS REMAIN IN SHARP DISPUTE, AND WERE NOT RESOLVED BY THE COURT BELOW. THE PETITION SHOULD BE DENIED.

All the issues presented by the petitioners turn on the particular facts of this matter, are of interest only to the parties to this case, and have no national importance. In support of their contrary view, petitioners offer only rhetorical abstractions regarding the "rule of law" and the allegedly "unique" nature of NEPA (Petition, pp. 5, 7).

Moreover, as set forth in our Statement of the Case, every fact germane to the petitioners' proposed questions and essential to petitioners' legal theories has been sharply contested by the City, and this factual dispute has not been resolved by either of the courts below. This Court has ruled that fact resolution is not a task to be served by a grant of certiorari. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). For this reason, the petition should be denied.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION PRESENTED. THE PETITION MUST BE DENIED.

There is no conflict among the Circuit Courts on the NEPA issue presented. Indeed, the Second Circuit decision established no precedent. It held only that, when justified by the particular facts and an appellate court's view of its remedial alternatives, a NEPA case can become moot. This ruling is consistent with NEPA decisions of the Sixth, Seventh, Ninth and Tenth Circuits. Hence, the petition must be denied.

First, we note that the facts of the NEPA cases relied upon by petitioners have little in common with those of this matter. They involve: storage of nuclear waste, airport construction and operation, 191 high-voltage transmission towers, and a coal loading facility on the Mississippi River. By contrast, the project at issue here is a surface discharge of twice-treated stormwater from a building and parking lot.

The petition alleges that the Sixth, Seventh, Ninth and Tenth Circuits have established a uniform rule that NEPA cases are never rendered moot by the completion of the challenged federal agency action (Petition, Point I). This is incorrect. Each of these Circuits have dismissed appeals in NEPA cases on mootness grounds where, as here, the challenged action was completed during the pendency of the case. *See Neighbors Organized to Insure a Sound Environment, Inc. v. McArtor*, 878 F.2d 174, 178 (6th Cir. 1989); *South East Lake View Neighbors v. Department of Housing and Urban Development*, 685 F.2d 1027, 1039, n.9

(7th Cir. 1982) (dicta); *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1987) (distinguishing *Columbia Basin Land Protection Ass'n. v. Schlesinger*, 643 F.2d 585 [9th Cir. 1981], relied upon by petitioners); and *Park County Resource Council, Inc. v. Department of Agriculture*, 817 F.2d 609, 614-615 (10th Cir. 1987), overruled on unrelated grounds, 956 F.2d 970, 973 (10th Cir. 1992).

This is to be expected. Mootness issues in a NEPA case, like those arising under any other federal statute, are decided, not by formula, but case by case, on the particular facts and circumstances involved. *See* the discussion and the many cases in Wright, Miller and Cooper, *Federal Practice and Procedure*, vol. 13A § 3533.3, pp. 261, 276 (1998 Supplement), 278 and 300 (West, 1984). As noted in Point I, above, the pertinent facts of this matter are in sharp dispute, and would have to be resolved by this Court before the question of mootness could even be reached. In these circumstances a grant of certiorari would be inappropriate.

There is no conflict in the Circuits, and the petition should be denied.

III.

THE CIRCUIT COURT'S DECREE WAS ISSUED ON AN APPEAL FROM AN INTERLOCUTORY ORDER. THE QUESTIONS PRESENTED BY PETITIONERS ARE NOT FUNDAMENTAL TO THE FURTHER CONDUCT OF THE CASE AND ARE NOT RIPE FOR REVIEW. THE PETITION SHOULD BE DENIED.

Petitioners seek to review a decree of the Circuit Court on an appeal from an interlocutory order, specifically, a denial of petitioners' motion for preliminary injunction. Further, the NEPA issues presented by petitioners are not fundamental to the further conduct of petitioners' remaining claims. This Court should await final judgment in the lower courts before considering an exercise of its certiorari jurisdiction. The petition should be denied.

Both the Circuit Court and the District Court opinions note that their orders were interlocutory in nature and that petitioners' claim against the City for compensatory damages was yet to be resolved. *See* the Circuit Court's opinion at (App. A, p. 7a) (petitioners "may perhaps be successful in obtaining other relief for their claimed harms . . . [b]ut only when such other relief is granted or denied . . . will the case become ripe for proper appellate review."). *See also* to the same effect, the District Court's Order at (App. B, p. 30a, n.12) (petitioners may "recover compensatory damages"). Resolution of the pending damage claim is in no sense dependent upon the NEPA issues presented in the petition since petitioners have not asserted a NEPA claim against the City.

In these circumstances, it is well established that a grant of certiorari is inappropriate. Indeed, the lack of finality in the order sought to be reviewed is itself sufficient ground for denial of the petition. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251 (1916); *American Construction Company v. Jacksonville, Tampa and Key West Railway Co.*, 148 U.S. 372 (1893); Stern, *et al.*, *Supreme Court Practice*, 7th Ed., § 4.18 (Bureau of National Affairs, 1993).

IV.

MOOTNESS ISSUES ASIDE, THE DISTRICT COURT'S DENIAL OF THE PRELIMINARY INJUNCTION WAS ENTIRELY PROPER AND LAWFUL.

Mootness issues aside, the District Court's denial of the motion for preliminary injunction was entirely proper and should not be disturbed. The District Court correctly held that petitioners had failed to prove their entitlement to preliminary relief.

The District Court succinctly and correctly set forth the appropriate standard for preliminary injunctive relief (App. B, p. 28a), and denied the petitioners' motion for failure to prove "probable irreparable harm" (*Id.*, pp. 28a-30a). The District Court also correctly found that petitioners'

> allegations of economic harm cannot support their motion for a preliminary inunction because economic harm, by its very nature, is redressable with monetary damages (*Id.*, n. 11, citation omitted).

The petitioners' focus in their motion papers on "economic" injury doomed their request for an injunction. Notably, there was no reference in the motion papers to alleged "environmental" injury; a reference which pervades their petition to this Court.

The District Court's denial of petitioners' motion was entirely proper and justified by the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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